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No. 06-1073

IN THE

Supreme Court of the United States

KATHY BLIESNER,

Petitioner,

v.

THE COMMUNICATION WORKERS OF AMERICA; VERIZON NORTHWEST, INC., fka GTE NORTHWEST INCORPORATED,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

VERIZON NORTHWEST, INC.'S (FKA GTE NORTHWEST INCORPORATED) RESPONSE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Pursuant to Rules of the Supreme Court of the United States, Rule 24.2, Respondent Verizon Northwest, Inc. ("Verizon") accepts the first two questions presented by Petitioner Kathy Bliesner's ("Petitioner") Petition for a Writ of Certiorari (the "Petition"). The third and fourth questions presented for review are more appropriately phrased as follows:

3. Did the Ninth Circuit Court of Appeals err by concluding that the U.S. District Court for the District of Idaho did not abuse its discretion in striking opinion testimony offered by Petitioner on the grounds that it was not based on personal knowledge, when that opinion testimony concerned Petitioner's belief about her ability to learn how to use computer systems that she admitted she had never worked with before?

4. Did the Ninth Circuit err in affirming the district court's grant of summary judgment?

RULE 14.1(b) STATEMENT

The caption contains the names of all parties to this proceeding.

CORPORATE DISCLOSURE STATEMENT

Verizon Northwest, Inc. identifies Verizon Communications Inc. as its corporate parent. No other corporate entity owns 10 percent or more of Verizon's stock. Verizon Communications Inc. is a publicly traded corporation, and no corporate entity owns 10 percent or more of its stock.

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STATEMENT OF THE CASE

This statement of the facts and posture of this case is drawn from the undisputed facts as identified by the district court and affirmed by the Court of Appeals. Petitioner has not objected to any determination of the undisputed facts[1] on

[1] Even as to those evidentiary rulings Petitioner does contest, (Petition, at pp. 9-10), Petitioner does not contest the undisputed facts on which basis the district court concluded that Petitioner lacked personal knowledge for her opinions.

which basis the district court granted, and the Ninth Circuit upheld, summary judgment to Respondents. Those decisions are attached to the Petition as Appendices A, B, and C.

This case involves a claim under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a). Petitioner alleges that Verizon violated the controlling collective bargaining agreement in denying her application to "bump" a less senior employee after Petitioner was laid off and that the Communications Workers of America ("CWA" or the "Union") violated its duty of fair representation in the processing of her grievance over that bump denial.

Petitioner began working for Verizon (then known as GTE Northwest Incorporated) in June 1969. The Union has represented certain employees at Verizon since 1983. On December 1, 1995, Petitioner was laid off as part of a company-wide reduction in force. Under Article 14 of the governing collective bargaining agreement, a senior employee could exercise "bumping rights" to displace a less senior employee and take his or her job if the bumping employee has the qualifications to do "the job" with only one week of "refresher" training.

By her own admission, Petitioner had no knowledge of or experience in many of the skills and tasks required to perform the position into which she was requesting to bump. The skills that Petitioner admitted not possessing included paying bills and processing expenses, using a computer system called "SODA," and using a separate computer system called "MARK." Thus, for these skills Petitioner would require initial training, not refresher training. Moreover, it was undisputed that it takes a few weeks to learn the system for paying bills and processing expenses; it was undisputed that a one-day basic training class is necessary to learn SODA; and it was undisputed that MARK requires a three- to four-week formal class. Based on these undisputed facts, the skills necessary to perform the position into which Petitioner

attempted to bump required more than one week of training. Verizon denied Petitioner's bump application.

Article 9 of the collective bargaining agreement provides for a three-step grievance procedure to grieve the bump denial. Petitioner's grievance was timely processed through all three steps of the grievance procedure. On March 19, 1996, at the conclusion of the third step, Verizon maintained its determination that Petitioner's bump request was properly denied.

Under the collective bargaining agreement, arbitration could be requested within thirty days of the completion of the grievance process. On April 5, 1996, the CWA timely provided written notice to Verizon to request arbitration of Petitioner's grievance. The Union did not, however, immediately move the case into arbitration as it continued to investigate. In a letter dated March 25, 1999, the CWA notified Petitioner of the Union's decision not to pursue her grievance to arbitration because, based on Verizon's supporting documentation, the Union did not think it would be successful. On April 7, 1999, Petitioner appealed the CWA's decision through the Union's internal appeal procedures and as a result, the Union agreed to proceed to arbitration.

Petitioner's grievance was arbitrated in October, 2001. On December 7, 2001, the Arbitrator dismissed the grievance as untimely. The Union's two motions for reconsideration were denied.

On June 7, 2002, Petitioner filed a hybrid section 301/ fair representation complaint against CWA and Verizon in federal district court. As she must, Petitioner alleged (1) Verizon violated the collective bargaining agreement in denying her bump application and (2) the CWA breached its duty of fair representation in handling her grievance. The district court granted summary judgment to both the Union and Verizon, holding that Petitioner had not shown the essential element

that Verizon had breached the collective bargaining agreement in denying her bumping request. Because it concluded that there had been no breach of the collective bargaining agreement, the district court did not address whether the Union breached its duty of fair representation and dismissed the action against both Verizon and the CWA. (*See* Petition, Appendix A, District Court Order and Judgment dated March 31, 2004.)

After the district court denied Petitioner's Motion for Reconsideration, she filed a Notice of Appeal on July 26, 2004. In its de novo review of the district court's grant of summary judgment, in which it upheld the granting of summary judgment against the Petitioner, the Ninth Circuit correctly held that in a hybrid section 301/fair representation suit, a district court need not address the duty of fair representation claim before the breach of the contract claim. *Bliesner v. Comm'n Workers of Am.*, 464 F.3d 910, 915 (9th Cir. 2006). The Ninth Circuit also correctly held that the district court did not abuse its discretion in striking the portion of Petitioner's affidavit stating that she could learn the MARK system in one week. *Id.*

ARGUMENT

I. The Ninth Circuit Correctly Applied Well-Settled Federal Law in Concluding That in a Hybrid Claim, There Is No Requirement to Consider the Fair Representation Claim Before Considering Whether There Was a Breach of the Collective Bargaining Agreement.

In analyzing a hybrid claim, there is no particular order in which the claims must be addressed. Petitioner erroneously asserts that the Ninth Circuit's decision (concluding that in a hybrid claim, the claims may be considered in any order) is in conflict with the Fourth Circuit and prior decisions of the U.S. Supreme Court. This is just wrong, on many levels.

Petitioner's theory is not well grounded on this Court's explanation of the nature of a hybrid section 301/fair representation action. Imposing such a requirement is contrary to any notion of judicial economy, especially in those circumstances when it is clear that that the collective bargaining agreement has not been breached—a determination that disposes of the entire claim. Finally, Petitioner's theory is not based on a fair reading of the cited Fourth Circuit decision—the only support offered for her novel and erroneous interpretation of the law.

A. It Is Well Established That to Succeed in a Hybrid Claim, Petitioner Must Prove Both a Breach of the Collective Bargaining Agreement and a Breach of the Duty of Fair Representation.

Petitioner alleges that Verizon breached the collective bargaining agreement in denying her bump application and terminating her employment. Petitioner further alleges that the Union's delay in handling her grievance constituted a breach of its duty of fair representation. It is well settled that such a claim as that raised by Petitioner combines two causes of action, and is commonly referred to as a hybrid section 301/fair representation claim. *DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 165 (1983). The success of Petitioner's claim depends on the viability of two allegations: (1) the employer breached the collective bargaining agreement; and (2) the Union breached its duty of fair representation. Failure to establish *either* element is fatal to a hybrid claim:

> Yet the two claims are inextricably interdependent. To prevail against either the company or the Union, . . . [employee-plaintiffs Petitioners] must not only show that their discharge was contrary to the contract but must also carry the burden of demonstrating breach of duty by the Union. The employee may, if he chooses, sue one de-

> fendant and not the other; but the case he must prove is the same whether he sues one, the other, or both.

Id. at 164-65 (ellipsis and brackets in original; internal quotation marks and citations omitted).

Petitioner concedes that her claim is a hybrid section 301/ fair representation claim, involving allegations of Verizon's breach of the collective bargaining agreement and the Union's breach of its duty to her. (Petition at 4-5.) However, Petitioner argues that a fair representation plaintiff need not allege the employer violated the collective bargaining agreement in order to prevail. (*Id.* at 8.) Plaintiff relies on *Breininger v. Sheet Metal Workers Intl. Assn., Local Union No. 6*, 493 U.S. 67, 81 (1989), to support that proposition. Petitioner is simply wrong to do so. *Breininger* involved only an allegation of discrimination by the union in its operation of its hiring hall. *Id.* at 71-72. Because the plaintiff in that case was not referred to potential employers, the plaintiff had no opportunity to work for an employer; thus, no claim against an employer could have arisen. *Breininger* is wholly inapposite to the case at bar.

It should therefore not be surprising that the process of which Petitioner complains—deciding hybrid section 301/fair representation claims on the basis of whichever claim can be most readily resolved—is routine in the federal courts. *E.g.*, *White v. Anchor Motor Freight, Inc.*, 899 F.2d 555, 559 (6th Cir. 1990) ("[I]f the first claim anchored in the employer's alleged breach of the [collective bargaining agreement] fails, then the breach of duty of fair representation claim against the union must necessarily fail with it."); *Laurin v. Providence Hosp.*, 150 F.3d 52, 61-62 (1st Cir. 1998) (absent requisite showing that hospital breached collective bargaining agreement, hybrid claim failed); *Nicholls v. Brookdale Univ. Hosp. & Med. Ctr.*, 204 F. App'x 40, 2006 WL 2990239 (2d Cir. 2006) (unpublished) (dismissing hybrid claim without considering whether hospital breached collective bargaining agree-

ment after determining that union did not breach its duty of fair representation); *Albright v. Virtue*, 89 F. App'x 769, 2004 WL 188333 (3d Cir. 2004) (unpublished) (court did not have to determine whether employer violated collective bargaining agreement after it determined that union did not breach its duty of fair representation); *Thompson v. Aluminum Co. of Am.*, 276 F.3d 651, 658 (4th Cir. 2002) ("Our conclusion that the Union did not breach its duty of fair representation resolves the case for Alcoa as well."); *Suter v. La. Philharmonic Orchestra*, No. 05-30824, 2006 WL 1877220 at *4, fn.6 (5th Cir. July 5, 2006) (slip op.) (because of resolution that employer did not breach collective bargaining agreement, court does not address district court's conclusion that union did not have duty of fair representation); *Higgins v. Int'l Union, Sec., Police, Fire Prof'ls of Am.*, 398 F.3d 384, 388 (6th Cir. 2005) ("Because the employees are unable to establish a genuine issue of material fact regarding their breach of contract claim against DaimlerChrysler, their remaining claim for breach of duty of fair representation under Section 301 must also fail."); *Crider v. Spectrulite Consortium, Inc.*, 130 F.3d 1238, 1243 (7th Cir. 1997) (recognizing that "[o]ur conclusion that Spectrulite did not breach the CBA when it fired Crider resolves the case for the Union as well," the court agreed with lower court's conclusion that claim against union would not survive summary judgment); *Talbot v. Robert Matthews Distrib. Co.*, 961 F.2d 654 (7th Cir. 1992) (affirming summary judgment; after finding employer did not breach collective bargaining agreement, it was unnecessary for district court to determine if union breached its duty of fair representation); *Slevira v. W. Sugar Co.*, 200 F.3d 1218, 1222 (9th Cir. 2000) (affirming summary judgment - after determining that claim against union failed, the court, without further analysis, held that claim against employer also failed); *Parker v. Connors Steel Co.*, 855 F.2d 1510 (11th Cir. 1988) (affirming district court's dismissal of hybrid claim when

district court determined that union did not breach its duty of fair representation).

Contrary to Petitioner's unfounded assertion, there is no authority that requires the district court to decide the fair representation claim first.

B. Requiring That a Court Always First Consider the Breach of Duty of Fair Representation Claim Does Not Promote Judicial Economy and Intrudes on a Court's Analytical Process.

Requiring a court to first consider the breach of duty of fair representation claim before it addresses the claim of breach of the collective bargaining agreement is senseless and promotes unnecessary busywork. As outlined above, it is undisputed that to prevail in hybrid claim, the employee must assert both a valid contract claim and a valid duty of fair representation claim. If one claim fails, the hybrid claim is doomed in its entirety. If a court, based on the record before it, determines that one claim is easier to resolve, it is practical, economical, and within its discretion for it to address that claim first, especially when a quick resolution of one element could dispose of the hybrid claim in its entirety. Requiring a court mechanically to first examine the duty of fair representation when it might be evident that the hybrid claim will not survive because there is no claim for breach of contract is a waste of judicial resources.

C. There Is No Conflict Among the Circuits Regarding the Order in Which the Claims Must Be Considered in Analyzing Hybrid Claims.

There is no conflict among the circuits regarding the order in which claims in a hybrid cause of action must be considered. Petitioner relies on language from *Thompson* for the proposition that in a hybrid claim, the court must first decide

whether the Union breached its duty of fair representation before it considers whether there was a breach of the collective bargaining agreement. (Petition at 10-11.) Petitioner's reliance on this isolated passage of *Thompson* is wrong for two independent reasons.

First, Petitioner is reading this language out of context. In *Thompson*, the Fourth Circuit also held that "in order to prevail on the merits against either party, an employee must prove both (1) that the union breached its duty of fair representation and (2) that his employer violated the collective bargaining agreement." 276 F.3d at 656 (*citing DelCostello*, 462 U.S. at 164-65). The court also recognized that "Thompson's claims against the Union and Alcoa are 'interlocked: neither claim is viable if the other fails.'" *Id.* at 657 (*quoting Crider*, 130 F.3d at 1241). The passage on which Petitioner relies (*id.*) thus occurs in almost the same judicial breath in which the court notes the wholly interdependent nature of the two claims.

Second, Petitioner's reliance on *Thompson* is wholly misplaced; in *Thompson* itself, the Fourth Circuit made clear that it was not suggesting the rule advocated by Petitioner. The Fourth Circuit noted that in a proper case, the district court could properly resolve a hybrid section 301/fair representation claim in precisely the manner objected to by Petitioner:

> Though we decline to do so here, where a court is well able to decide that the employee's contractual claim lacks merit as a matter of law, it is appropriate for the court to decide the case on that issue.

Id. at 657 n.7. Simply put, the Fourth Circuit resolved *Thompson* in the same manner federal courts have routinely resolved hybrid section 301/fair representation cases: It decided the case on the basis of the claim most readily resolved which fully decided the matter. There is no split within the

circuits.[2] When properly analyzed, Petitioner's position is without any support whatsoever.

II. The Ninth Circuit Correctly Determined That the District Did Not Abuse Its Discretion in Applying the Rules of Evidence to Strike Portions of Petitioner's Affidavit.

Petitioner inappropriately requests that this Court grant certiorari concerning an evidentiary issue and disturb the Ninth Circuit's affirmation that the district court did not abuse its discretion in striking portions of Petitioner's affidavit. It is well settled that rulings on evidentiary issues, specifically including a district court's ruling on a motion to strike, are reviewed for an abuse of discretion. *See Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 141 (1997) ("We have held that abuse of discretion is the proper standard of review of a district court's evidentiary rulings."); *Old Chief v. United States*, 519 U.S. 172, 174 n.1 (1997) (same); *Snake River Valley Elec. Asso'n v. PacifiCorp*, 357 F.3d 1042, 1052 n.11 (9th Cir. 2004) (appellate courts review district court's rulings on evidentiary issues for abuse of discretion); *Hambleton Bros. Lumber Co. v. Balkin Enters., Inc.*, 397 F.3d 1217, 1224 n.4 (9th Cir. 2005) (*citing El Pollo Loco, Inc. v. Hashim*, 316 F.3d 1032, 1038 (9th Cir. 2003)). Absent a clear abuse of discretion, a district court's evidentiary rulings are not reversible. *McGonigle v. Combs*, 968 F.2d 810, 818 n.6 (9th Cir. 1992). "Discretion is abused when the judicial action is arbitrary, fanciful or unreasonable or where no reasonable man [or woman] would take the view adopted by the trial

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[2] Verizon notes that the Fourth Circuit has not followed the supposed "rule" identified by Petitioner. *See Taylor v. Siemens VDO Auto. Corp.*, 157 F. App'x. 557, 2005 WL 2952232 (4th Cir. 2005) (unpublished) (affirming dismissal of hybrid claim after first determining that employer did not breach collective bargaining agreement).

court." *El Pollo Loco, Inc.*, 316 F.3d at 1041 (internal quotation marks and citation omitted; brackets in original).

The Ninth Circuit correctly concluded that the district court did not abuse its discretion when it applied the rules of evidence to strike certain portions of Petitioner's affidavit. In her affidavit, Petitioner made statements that she could have learned the needed skills, including MARK—a computer program which was a necessary part of the job into which she sought to bump—in one week. There was uncontroverted evidence in the record that MARK requires a three-week training class, and Petitioner also admitted in her deposition that she had no knowledge of MARK. In applying Rule 56(e) of the Federal Rules of Civil Procedure, the district court found:

> Affiant in this case has no personal knowledge that she could be trained in less time than asserted is necessary by Verizon. Rather, she believed she could learn all the skills in one week. This "belief" does not appear to be based on any evidence other than Ms. Bliesner had been an employee for a long period of time, therefore, she felt she could learn the necessary skills. While the Court does not doubt that Ms. Bliesner could have eventually learned the necessary skills, the facts are undisputed that the time required to learn all of the undisputed essential and necessary skills for the . . . position would exceed one week and the one-week time limit was a condition that must be satisfied before a bump request could be approved for the . . . position. Ms. Bliesner's affidavit statements that she believed she could learn in one week all the skills, without more (such as evidence the MARK training only takes a week instead of 3-4 weeks or other employees had completed such training in one week . . .) does not provide the specific facts required under Rule 56(e) necessary to create a basis for her "belief." The statements are conclusory and insufficient as a matter of law to survive summary judgment on this issue of whether she could be trained within one week.

(Appendix A to Petition at 9.) Based on the record, the district court's ruling was not "arbitrary, fanciful or unreasonable." The Ninth Circuit appropriately found that the district court did not abuse its discretion in striking those portions of Petitioner's affidavit (for lack of personal knowledge) concerning her own belief that she could be trained in a week.

Petitioner's reliance on cases such as *United States v. Rodriguez*, 162 F.3d 135 (1st Cir. 1998) is completely misplaced. Federal Rule of Evidence 602 provides that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Even when such personal knowledge is expressed in terms of inferences or opinions, that testimony must still be "'grounded on personal observations and experience.'" *Rodriguez*, 162 F.3d at 144 (citation omitted). Here, the district court was well within its discretion to conclude that whatever Petitioner's experience as a Verizon employee, she had no experience whatsoever with the MARK or SODA computer systems. Her opinion about how long it would take her to learn those systems could not be based on her own observations and experience. On the other hand, the observations of managers who supervise employees going through that training are based on personal knowledge as to the length of time that training takes. The district court was correct and did not abuse its discretion to exclude Petitioner's proffered testimony for lack of personal knowledge and to permit the relevant manager's testimony.

III. The Petition Is Futile, Because Verizon Did Not Violate the Collective Bargaining Agreement.

As set forth above, under well-settled law, Petitioner must establish both a breach of the collective bargaining agreement and a violation of the duty of fair representation to succeed on her claim. As both the district court and the Ninth Circuit concluded, under the unambiguous provisions of the collective bargaining agreement, Verizon did not violate the con-

tract. Thus Petitioner cannot prevail, and her substantive complaint concerning the order in which her claims are analyzed is fundamentally pointless.

The collective bargaining agreement is wholly unambiguous: A person seeking to bump into a position must have the qualifications to perform the job, or be able to "easily acquire the qualifications" as set forth in the agreement. Collective bargaining agreement, § 14.5.1 (Appendix A to Petition at 9a). To easily acquire the qualifications, the employee would be given "refresher" training on the job for up to one week. Collective bargaining agreement, § 14.5.2 (Appendix A to Petition at 9a.) The collective bargaining agreement contains an exception to the "refresher" nature of the training, but that was limited to positions for which "the requirements of the job . . . can be readily learned without formal training." *Id.* Given the undisputed evidence that there were formal classes for several of the skills needed for the position into which Petitioner sought to bump, the exception to the requirement that training be only "refresher" is irrelevant. Even if it were at issue, however, the exception still only permitted one week of on-the-job training. (*Id.* at 9a-10a.)

The undisputed evidence before the district court—drawn from Petitioner's own sworn deposition testimony—demonstrated that she had *no* experience whatsoever with several of the needed qualifications for the job into which she was attempting to bump:

1. The MARK computer system;
2. The SODA computer system;
3. The processing of expense vouchers;
4. Updating EIRs;[3]

[3] Employee Information Records, Verizon's formal documents for maintaining personnel information.

5. Updating performance reviews;

6. Handling absence control procedures;

7. Processing Family Medical Leave Act requests.

Additionally, it was similarly undisputed that Petitioner had only limited experience with:

1. The computer program Lotus 1-2-3;

2. The computer program SES;

3. The computer program WordPerfect; and

4. The generation of company correspondence.

Appendix A to Petition, at 11a

The undisputed evidence was that the necessary training programs to learn just *some* of these skills would take several weeks. Specifically, the SODA system alone required a one-day class. The MARK system alone required a formal class of three to four weeks. The system to pay bills and process expense vouchers, alone, required a few weeks of training. *Id.*

Given that the position into which Petitioner sought to bump required formal training, the exception—permitting initial on-the-job training—was not applicable. Because Petitioner would have required initial training, not refresher training, her bump was properly denied.

Thus, the district court and the Ninth Circuit reached the correct result, regardless of the district court's ruling on the motion to strike Petitioner's opinion testimony. Petitioner's baseless belief that she could have learned all these skills in one week is irrelevant. Because Petitioner admits that she would have had to learn these skills as an *initial* matter, this was not "refresher" training as permitted by the collective bargaining agreement, and Petitioner's bump was properly denied.

Finally, Verizon did not violate the collective bargaining agreement, even if Petitioner were to be permitted initial on-the-job training. This is true for at least two reasons. First, even if the Court were to credit Petitioner's unfounded opinion that she could learn within one week how to use systems she had never used before, which normally require weeks worth of training, that opinion misses the point. It is undisputed that several of those skills require formal classwork, not on-the-job training. On-the-job training is all that the CBA permits. Second, the district court opinion focused on the MARK and SODA systems. Learning each of those two systems involved formal classes, of three to four weeks and one day, respectively. It was undisputed, however, that Petitioner was deficient on no less than *five* other skills, all of which she admitted she had never done before. (*Id.* at 11a.) As set forth above, the district court did not abuse its discretion in striking—for a complete lack of personal knowledge—Petitioner's conclusory assertion that she could learn this mass of wholly new skills within one week. Similarly, Verizon did not violate the collective bargaining agreement in so concluding.

Simply put, as a matter of undisputed fact Verizon was correct to deny Petitioner's bump request. Because Verizon did not violate the collective bargaining agreement, Petitioner's hybrid claim is barred. *DelCostello*, 462 U.S. at 164-65. The Petition is therefore futile.

CONCLUSION

For the foregoing reasons, the Petition for a writ of certiorari should be denied.

Respectfully submitted,

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